

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,  
Plaintiff and Respondent,  
  
v.  
  
RUFINO ACEVEDO et al.,  
Defendants and Appellants.

B220081  
  
(Los Angeles County  
Super. Ct. No. BA302020)

---

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Jr., Judge. Affirmed.

Charles B. Holzhauser, under appointment by the Court of Appeal, for Defendant and Appellant, Rufino Acevedo.

Law Offices of Richard G. Novak, Richard G. Novak and Iris Roe Lee for Defendant and Appellant, Steven Montes.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant, Augustin Alvarez.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant, Omar Cruz.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

---

\* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts B.3. and 4. of the Discussion.

The appellants were arrested on charges arising from seizures of over 350 kilograms of cocaine, 50 pounds of methamphetamine, 650 pounds of marijuana, firearms, and more than \$1,200,000 in illegal proceeds, resulting from investigations involving court-authorized wiretaps. After being convicted on drug trafficking charges, they challenge the trial court's refusal to compel discovery of redacted and sealed portions of the documentation supporting the wiretap authorization orders, and its refusal to suppress the resulting wiretap and other evidence that led to their arrest. These rulings, they contend, violated their rights under state and federal law. We will affirm.

### **STATEMENT OF THE CASE**

A 14-count information, filed October 31, 2008, charged appellants Rufino Acevedo, Steven Montes, Augustin Alvarez and Omar Cruz (and one other person not a party to this appeal) with some or all of the following crimes: conspiracy to commit possession and transportation of cocaine for sale (Pen. Code, § 182, subd. (a)(1)),<sup>1</sup> Health & Saf. Code, §§ 11351, 11352); possession for sale, and transportation, of a controlled substance (cocaine) (Health & Saf. Code, §§ 11351, 11352, subd. (a)); possession of money or instruments over \$100,000 from sales of cocaine (Health & Saf. Code, §§ 11370.6, subd. (a)); and false compartment activity (Health & Saf. Code, §§ 11366.8, subd. (a)).<sup>2</sup> The information also alleged weight enhancements with respect to the controlled substances, ranging from one to 80 kilograms. (Health & Saf. Code, § 11370.4, subds. (a)(1), (a)(6).)

Appellants pleaded not guilty and denied the allegations. After their motions for discovery of wiretap documentation and to suppress wiretap evidence were denied, they pleaded no contest and were convicted.

---

<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> Health and Safety Code section 11366.8, subdivision (a), provides for punishment of persons who possess, use, or control a "false compartment" with the intent to "store, conceal, smuggle, or transport" a controlled substance.

The appellants' contentions in this appeal arise from the trial court's denial of their motions for discovery of unredacted documents supporting the wiretaps that led to their arrests, and for suppression of the evidence resulting from the wiretaps.

### **The Wiretap Orders**

Between November 3, 2005, and April 2006, law enforcement agencies obtained orders signed by Judges Larry P. Fidler and Curtis B. Rappé of the Los Angeles Superior Court (joined in one instance by a judge of the Riverside Superior Court) authorizing seven wiretaps involving 14 cell phones allegedly used by Montes. The orders included the magistrates' findings of probable cause to believe that defendant Montes and others "have committed, are committing and are about to commit" specified drug trafficking offenses, that communications concerning the crimes would be obtained by requested wiretap interceptions, and that "[n]ormal investigative procedures have been tried and have failed and appear to be unlikely to succeed if tried and/or are too dangerous." (See § 629.52.) Each of the orders also provided that the order, the application supporting it, and the intercepted communications would be sealed pursuant to the official information privileges and procedures of Evidence Code sections 1040 through 1042, and the decision in *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*).<sup>3</sup>

The information obtained as a result of the wiretaps led to the arrest of Montes and each of the other appellants, for their participation in a drug trafficking operation headed by Montes, involving the transportation of large amounts of cocaine from Mexico to Southern California and other locations around the country.

---

<sup>3</sup> The *Hobbs* decision held that statutory requirements of disclosure of search warrant documentation are subject to an exception permitting supporting affidavits to be sealed when necessary to protect a confidential informant's identity. (7 Cal.4th at pp. 963, 970-971.) *Hobbs* approved procedures for in camera review of the sealed materials without disclosure to defendants or their counsel, in order to determine the propriety of the government's nondisclosure, and to safeguard the defendants' rights while protecting the government's legitimate interests in the information's confidentiality. (*Id.* at pp. 966, 970-972.)

## **Discovery and Disclosure of Redacted Wiretap Authorization Documentation**

Following the filing of the complaint in May 2006, appellants' counsel were provided with copies of the wiretaps' supporting affidavits and investigative reports; however, those documents were redacted, heavily in some places, in order to conceal portions that the law enforcement agencies believed would reveal privileged official information or compromise the identity of confidential informants. The documentation that was provided to the defendants consisted of a list of 40 overt acts supporting the felony complaint's conspiracy charges, the affidavits of Special Agents Salaiz and Wilde of the California Department of Justice Bureau of Narcotics Enforcement supporting the wiretap requests, as well as six-day reports and investigative reports from the wiretaps, and letters setting forth the prosecution's refusal to provide unredacted copies of further supporting documentation.

According to these documents, the information obtained from the wiretaps and from other methods of investigation between November 2005 and April 2006 led to seizures of 353 kilograms of cocaine, 50 pounds of methamphetamine, 659 pounds of marijuana, five firearms, and more than \$1,200,000 from illegal drug transactions. Montes and the other appellants were arrested at various locations, including Chicago, Illinois and California.

On September 1, 2006, Montes, joined by the other defendants, moved in the trial court for discovery of the unredacted wiretap documentation.<sup>4</sup> Their motion sought disclosure of the documentation in two categories: the unredacted affidavits supporting the applications for wiretap authorization orders, and the unredacted transcripts and investigative reports prepared during and after the intercepts, including the text of all intercepted statements made by Montes. The motion argued that the refusal to produce unredacted copies of the investigative reports and affidavits was inconsistent with the prosecution's discovery obligations, and that the redactions deprived the defendants of

---

<sup>4</sup> Unless otherwise indicated, all the appellants joined in the motions and briefs filed on Montes's behalf, both in the trial court and in this court.

their constitutional and statutory rights to challenge the wiretaps. The initial motion focused solely on the right to discovery as a basis for litigating the wiretaps' necessity, expressly disclaiming any intention to seek disclosure of the identity of any confidential informant or to challenge the existence of probable cause for the wiretaps.

The prosecution opposed the discovery motion, invoking the privileges of Evidence Code sections 1040 and 1041, the exemptions from discovery set forth in Penal Code sections 1054.6 and 1054.7, and the provisions of Evidence Code section 1042 and the procedures approved in *Hobbs* for in camera determination of the validity of the privilege claims. (Evid. Code, § 1042, subd. (d).) The appellants argued in reply that the *Hobbs* procedures apply only to search warrant affidavits, not wiretap authorization affidavits; and that the statutory privileges cannot overcome the defendant's right to mount a meaningful challenge to the sufficiency of the wiretaps' supporting evidence.

#### **Order for Partial Disclosure of Redacted Documentation**

On October 13, and November 8, 2006, the trial court held hearings in camera, out of the presence of the appellants and their attorneys, under the authority of Evidence Code section 1042, subdivision (d), and *Hobbs*, ordering the transcripts of those hearings sealed. At a November 16, 2006 hearing, with all parties present, the trial court confirmed its earlier rulings that the *Hobbs* procedures would be applied to hear and determine the issues raised by the defendants' discovery motion (as well as an anticipated future motion to suppress the wiretap evidence). With respect to the redactions, the court denied the motion to require unredacted production of all the documentation. However, it also ruled on the basis of its in camera review of the unredacted documents that certain of the redactions were not justified, and that those portions of the unredacted documents must be produced to appellants' counsel.<sup>5</sup> The defendants later received the additional unredacted portions of the record that had been ordered disclosed.

---

<sup>5</sup> After obtaining a continuance from the trial court, the appellants prosecuted unsuccessful challenges to the court's denial of their disclosure motion, seeking writ relief in this court (case No. B196108), review by our Supreme Court (case No. S150399), and certiorari from the United States Supreme Court (case No. 07-66).

## **Motion to Suppress Wiretap Evidence**

On February 25, 2008, the appellants moved in the trial court to suppress all evidence derived from the wiretaps, on grounds that the supporting affidavits were insufficient to establish the required elements of probable cause and the necessity for the wiretaps. The trial court then held another in camera hearing, again reviewing the unredacted and sealed wiretap documentation in the presence of the prosecution and the affiants, but outside of the presence of the defendants and their counsel.<sup>6</sup>

On October 14, 2008, after having reviewed the unredacted affidavits in camera, the court ruled that the documentation sufficiently supported each of the wiretaps, and denied the motion for suppression of the wiretap evidence. Specifically, it found that the facts set forth in the wiretap applications were sufficient to support the issuing magistrates' determinations that probable cause existed to justify the wiretaps' issuance, and that they had acted within their discretion in ruling that necessity for the wiretaps was shown by evidence that other investigative procedures had been tried and had failed, or reasonably appeared to be either too dangerous or unlikely to succeed.<sup>7</sup>

---

<sup>6</sup> The People unsuccessfully challenged the standing of the defendants other than Montes to attack the wiretaps' validity, arguing that because Montes was the only defendant that acknowledged ownership of the target telephones or participation in intercepted communications, the others could not claim any reasonable expectation of privacy with respect to the intercepted communications. Respondent has not raised the standing issue in this court. We note, however, that section 629.72 provides that a motion to suppress wiretap evidence "shall be made, determined, and be subject to review in accordance with the procedures set forth in Section 1538.5"; and subdivision (m) of section 1538.5 provides for challenges to a search or seizure when the moving party "is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her." (§ 1538.5, subd. (m); *People v. Davis* (2008) 168 Cal.App.4th 617, 629; see also *People v. Jackson* (2005) 129 Cal.App.4th 129, 146, fn. 19.)

<sup>7</sup> The court also denied a related challenge to a search warrant executed at the home of defendant Alvarez in Chicago, which apparently had been obtained using the results of the wiretap investigations.

## **The Preliminary Hearing**

Special Agent Salaiz testified at the ensuing preliminary hearing, setting forth his experience as a special agent of the Department of Justice Bureau of Narcotics Enforcement, his identification of the defendants, his participation with another specified special agent in obtaining the wiretap orders used in this case, and his monitoring of targeted telephone communications. Special Agent Salaiz and other law enforcement officers testified that wiretap interceptions of communications to and from the telephones targeted by the wiretap orders in this case led to seizure of substantial quantities of money and cocaine.

In response to cross-examination about the facts in the supporting affidavits, Special Agent Salaiz invoked the privileges of Evidence Code sections 1040 and 1041, declining to testify about when he had personally spoken with Montes, whether he had found evidence of methamphetamine production or distribution by Montes, and whether a particular conversation he was alleged to have had with Montes had been recorded.<sup>8</sup>

## **The Judgments**

After the trial court's refusal to unseal the record of the court's in camera hearings, and its denial of their motions to suppress the evidence derived from the wiretaps, the defendants withdrew their pleas of not guilty, entered negotiated no contest pleas to various of the charges, and were each convicted and sentenced for the crimes to which they had pleaded. These appeals followed.<sup>9</sup>

---

<sup>8</sup> Contending that a yes-or-no response to this final question could not possibly reveal or compromise a confidential informant's identity, Montes's counsel argued that no privilege could legitimately be claimed with respect to it. The court responded by recessing the hearing for a further in camera examination of Agent Salaiz out of the presence of the defendants and their counsel. Following that hearing, the court informed the parties that the conversation had been recorded, but that the privilege would preclude any further questions on that subject. The court then again denied the request for disclosure of all of Montes's intercepted statements, declining to state its reasons further in open court.

<sup>9</sup> On April 2, 2010, Division Eight of this court relieved appellants Alvarez and Cruz of defaults, directing that their appeals be accepted as timely filed.

## DISCUSSION

Appellants argue that the procedures of Evidence Code section 1042 and the *Hobbs* decision apply only to search warrants, and that no California court has approved their application to wiretap authorizations. These procedures cannot be used as they were in this case, appellants contend, to evaluate the sufficiency of the grounds for authorizing the wiretaps; and even if these procedures apply to wiretaps, the wiretaps' unredacted supporting documentation and the content of the intercepted communications should have been disclosed. Because it was not, the evidence derived from the wiretaps should have been suppressed. We conclude below that in evaluating the wiretap authorizations the trial court correctly applied the procedures outlined in *Hobbs*, and that the record supports its refusal to require disclosure of the sealed wiretap documentation or to suppress the wiretap evidence.

“California law prohibits wiretapping,” except as provided by statute. (*People v. Leon* (2007) 40 Cal.4th 376, 383.) Because “[t]he federal wiretap act establishes minimum standards for the admissibility of evidence procured through electronic surveillance,” and “[s]tate law cannot be less protective of privacy than the federal wiretap act,” California courts “may look for guidance to cases under title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code sections 2510 to 2520 (federal wiretap act), ‘which “provides a ‘comprehensive scheme for the regulation of wiretapping and electronic surveillance.’”” (*Id.* at p. 384; *People v. Jackson, supra*, 129 Cal.App.4th at pp. 146-147.) In applying the California wiretap statute we therefore look to both federal and California law. (*People v. Jackson, supra*, 129 Cal.App.4th at pp. 146-147; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1196, 1204-1207.)

A wiretap may be ordered based upon affidavits that establish certain factual elements. These include (so far as is relevant here) probable cause to believe that an individual is committing one of a number of specified crimes (among them the drug-trafficking crimes charged in this case), and that communications concerning the crimes will be obtained by the wiretaps; and a “necessity” element consisting of cause to believe

that “[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous.” (§ 629.52.)

A trial court’s determination that the documentation supporting the wiretap authorization application satisfies these requirements is entitled to substantial deference and is reviewed for abuse of discretion. (*People v. Zepeda, supra*, 87 Cal.App.4th at p. 1204.) We defer to the trial court’s express and implied factual findings that are supported by substantial evidence. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1171; *People v. Reyes* (2009) 172 Cal.App.4th 671, 683.)

#### **A. Appealability**

Section 1237.5 provides that “[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere” unless the defendant has sought and obtained a certificate of probable cause for the appeal. Notwithstanding that broad language, however, search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m), may be raised on appeal following a nolo contendere plea, without a probable cause certificate. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74.) A defendant may “seek further review of the validity of a search or seizure on appeal” following a conviction based on a no contest plea, “if at some stage of the proceedings prior to conviction he or she has moved for . . . the suppression of the evidence.” (§ 1538.5, subd. (m); *Hobbs, supra*, 7 Cal 4th at pp. 955-956; see also Cal. Rules of Court, rule 8.304(b)(4)(A).) These conditions are met with respect to the appellants in this case.<sup>10</sup>

---

<sup>10</sup> For this reason we do not consider whether the term of defendant Montes’s plea agreement expressly preserving his right to appeal from the court’s pretrial rulings, including “all the issues, discovery issues and wiretap issues, which include fourth amendment rights” would otherwise be sufficient to confer standing to any of the defendants in this court.

**B. The Trial Court Did Not Err By Denying Discovery Of The Unredacted Supporting Affidavits And Refusing To Suppress The Wiretap Evidence.**

In *Hobbs, supra*, 7 Cal.4th 948, our Supreme Court determined that when necessary to protect a confidential informant's identity, major portions (or even all) of a search warrant's supporting affidavit may validly be sealed and withheld from disclosure to the defendant. And it outlined and approved the procedures to be employed by courts when balancing the need for nondisclosure with the defendant's right to challenge the warrant's evidentiary sufficiency. (*Id.* at pp. 963-964.)

**1. The trial court properly ruled that the privileges and procedures of Evidence Code sections 1040 through 1042 apply to wiretap authorization affidavits.**

Section 629.70 provides that when a defendant has been identified as a result of a wiretap interception obtained under section 629.50 et seq., "the prosecution shall provide to the defendant a copy of all recorded interceptions from which evidence against the defendant was derived, including a copy of the court order, accompanying application, and monitoring logs." (§ 629.70, subd. (b).) This requirement parallels the statutory mandate to disclose the statements of all defendants. (§ 1054.1; *People v. Jackson, supra*, 129 Cal.App.4th at p. 170.)

Under both federal and state law, however, these disclosures are not mandatory in all circumstances. Subdivision (d) of section 629.70 expressly authorizes the court to limit these disclosures "upon a showing of good cause." And section 1054.7 provides that the court may deny discovery for "good cause," including possible danger to a witness or compromise to other investigations. Federal law also recognizes a privilege requiring nondisclosure of "the identity of persons supplying the government with information concerning the commission of crimes," unless the confidential informant is also a material witness on the issue of the defendant's guilt or innocence. (*McCray v. Illinois* (1967) 386 U.S. 300, 308-309 [87 S.Ct. 1056; 18 L.Ed.2d 62], italics omitted, quoted in *Hobbs, supra*, 7 Cal.4th at p. 958; see *Roviaro v. United States* (1957) 353 U.S. 53, 61 [77 S.Ct. 623; 1 L.Ed. 639].)

Evidence Code sections 1040 and 1041 codify the privileges to refuse disclosure of confidential official information and the identity of confidential informants, and Evidence Code section 1042 provides the procedures used to determine whether these privileges may be invoked to prevent disclosures in any particular case. Evidence Code section 1040 provides governmental entities with a privilege to refuse to disclose confidential official information when the public interest in preserving the confidentiality of the information “outweighs the necessity for disclosure in the interest of justice.” (Evid. Code, § 1040, subd. (b)(2).) And Evidence Code section 1041 provides that a public entity is privileged “to refuse to disclose the identity of a person who has furnished information [in confidence concerning a violation of law] . . . if . . . [¶] . . . [¶] (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice . . . .”

Evidence Code section 1042 contains legislative determinations that in some circumstances disclosure of neither confidential official information nor the identity of an undisclosed informant is required in order to establish the existence of reasonable cause for an arrest or search or the admissibility of evidence obtained as a result of it. (Evid. Code, § 1042, subds. (b), (d).) Under that procedure, when the prosecution refuses to disclose information pursuant to such a privilege, the trial court must hear the evidence in camera, if necessary. The court “shall not order disclosure” unless it then concludes from the evidence—including the evidence presented to it in camera—“that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.” (Evid. Code, § 1042, subd. (d).)

The privileges of Evidence Code sections 1040 and 1041 apply, by their terms, whenever the need for confidentiality outweighs the necessity for disclosure; their application is not confined to proceedings involving search warrants or any other particular circumstance. And although Evidence Code section 1042 expressly references its applicability in proceedings to establish the existence of reasonable cause for an arrest or search, it does not limit its application to those proceedings. Nothing in Evidence

Code sections 1040 through 1042 precludes the application of these privileges and procedures in proceedings to establish the sufficiency and legality of wiretap authorization orders. (See *United States v. Ippolito* (1985) 774 F.2d 1482, 1485 [applying procedures used to evaluate sufficiency of search warrant affidavits to determine sufficiency of wiretap authorization affidavits]; *Berger v. New York* (1967) 388 U.S. 41, 55-56 [87 S.Ct. 1873; 18 L.Ed.2d 1040] [applying constitutional requirements for search warrants to analysis of sufficiency of requirements for electronic eavesdropping].)

**2. The trial court properly ruled that the procedures outlined in *Hobbs* apply not only to search warrants, but also to wiretap authorization orders.**

The trial court properly ruled that the procedures outlined in the *Hobbs* decision with respect to search warrants are applicable also to determine the sufficiency of the support for the wiretap authorization orders and the propriety of the nondisclosures of wiretap documentation in this case.

In *Hobbs*, the court examined “the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant’s right of reasonable access to information upon which to base a challenge to the legality of a search warrant.” (7 Cal.4th at p. 957.) Relying on established precedent, it outlined the procedures courts should use to appropriately balance the justification for law enforcement’s refusal to disclose privileged information, on the one hand, with a defendant’s right to discovery of the warrant’s factual basis, on the other. (*Id.* at pp. 971-973; see *People v. Luttenberger* (1990) 50 Cal.3d 1, 20.) In this case the trial court ruled that these same procedures apply equally to evaluation of the defendant’s requests for discovery of the unredacted wiretap documentation, and their motion to suppress the wiretap evidence.

By their extension to wiretaps, the *Hobbs* procedures provide that the wiretaps' supporting documentation may validly be withheld from disclosure only to the extent necessary to protect official information or an informant's identity. (*Hobbs, supra*, 7 Cal.4th at p. 971; *Roviaro v. United States, supra*, 353 U.S. at p. 60; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1296.) "[A] criminal defendant's right to discovery is based on the fundamental proposition that the accused is entitled to a fair trial and the opportunity to present an intelligent defense in light of all relevant and reasonably accessible information." (*Hobbs, supra*, 7 Cal.4th at p. 965.) "Where disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way." (*Roviaro v. United States, supra*, 353 U.S. at pp. 60-61.)<sup>11</sup>

These are not the only principles that guide us, however. A defendant's right to challenge a search warrant's supporting affidavit does not automatically negate or overcome the privileges that protect official information and the identity of confidential informants. (*People v. Luttenberger, supra*, 50 Cal.3d at pp. 20-21.) So too, the right to disclosure is not absolute, even when nondisclosure might impair his ability to challenge the accuracy and sufficiency of an affidavit that establishes probable cause or necessity for an investigatory wiretap. "[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense, . . . taking into consideration the crime charged, the possible defenses, the possible significance of the

---

<sup>11</sup> Nor is the defendant limited to challenging only the sufficiency of the supporting affidavit's recitals; a defendant may challenge not just the warrant's facial sufficiency, but also the accuracy of the recited facts. That principle was established with respect to search warrant challenges by *Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [88 S.Ct. 2678; 57 L.Ed.2d 667]. (*United States v. Kiser* (9th Cir. 1983) 716 F.2d 1268, 1271.) And federal authorities have held that the same rule applies to the probable cause and necessity requirements for wiretap authorization orders. (*United States v. Ippolito, supra*, 774 F.2d at p. 1485; *United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1208, 1221 (*per curiam*) [*Franks* hearing requirements apply to wiretap necessity determination].)

informer's testimony, and other relevant factors.” (*Roviaro v. United States, supra*, 353 U.S. at p. 62.) Where these governmental privileges are involved, the trial court ““retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest.’ [Citation.]” (*People v. Luttenberger, supra*, 50 Cal.3d at p. 21.)

It is, however, the defendant's burden to establish the need for the information. A defendant must show more than a ““mere suspicion”” that the information sought will prove ““relevant and helpful”” to his defense, or that it will be “essential” to a fair determination. (*United States v. Henderson* (9th Cir. 2000) 241 F.3d 638, 645.) Only when a defendant has made a ““minimal threshold showing”” that the disclosure would be relevant and helpful to at least one asserted defense, the Ninth Circuit Court of Appeals has held, “an *in camera* hearing is [the] favored procedure” to determine whether disclosure is necessary. (*United States v. Spires* (9th Cir. 1993) 3 F.3d 1234, 1238; see *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1276 [disclosure of informant's identity required only on showing of reasonable possibility that informant could give evidence that might exonerate defendant, on issue of guilt or an issue on which the defendant has burden of producing some evidence].)

This is wholly consistent with the procedures mandated in Evidence Code section 1041 and subdivision (d) of Evidence Code section 1042, and in *Hobbs*. (Evid. Code § 1042, subd. (d) [when a party demands disclosure of informant's identity, court conducts hearing, *in camera* when privilege is claimed, at which parties may present evidence on the issue of disclosure]; *Hobbs, supra*, 7 Cal.4th at p. 971; see *Davis v. Superior Court, supra*, 186 Cal.App.4th at p. 1277 [in camera hearing procedure of Evidence Code section 1042, subdivision (d), strikes appropriate balance between public interest in confidentiality and defendant's right to disclosure]; see also *United States v. Fields* (2d Cir.1997) 113 F.3d 313, 323-324 [trial court's *in camera* interview of informant, with input as to matters defense considers relevant, adequately protected defendant's rights; disclosure of informant not required]; *United States v. Johns* (9th Cir.

1991) 948 F.2d 599, 606 [in camera hearing “provides a balance between the competing interests of the government and the accused”].)

Because “the warrant affidavit is *presumed* truthful,” it is only upon “some showing that the presumptively valid warrant affidavit is questionable in some way” that a defendant can force a review of the accuracy of a search warrant affidavit’s supporting facts. (*People v. Luttenberger, supra*, 50 Cal.3d at p. 21; *Hobbs, supra*, 7 Cal.4th at p. 966.) And where the undisclosed informant’s supporting testimony is relevant only in connection with a challenge to the legal sufficiency of a search warrant, rather than to the defendant’s guilt or innocence of the charges, the informant’s identity need not be disclosed. (*Hobbs, supra*, 7 Cal.4th at pp. 959-960; see *United States v. Harris* (7th Cir. 2008) 531 F.3d 507, 515; *United States v. Bender* (7th Cir. 1993) 5 F.3d 267, 270.)

Moreover, even search warrants are issued only when a magistrate has been persuaded by the facts stated in the supporting affidavit that good cause justifies the intrusion on the defendant’s privacy. That circumstance justifies the rule ““that where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.”” (*Hobbs, supra*, 7 Cal.4th at p. 960.) That same justification is all the more applicable with respect to wiretap authorizations, and therefore is all the more reason that the reasoning of *Hobbs* should apply here. Unlike search warrants, wiretap authorization orders require the personal oath or affirmation of an approved official of the Attorney General’s or a district attorney’s office, rather than merely any law enforcement officer—thus providing an additional layer of protection against unjustified intrusions. (§ 629.50, subd. (a); see *People v. Jackson, supra*, 129 Cal.App.4th at pp. 144, 159 [law subjects authorization of wiretap to “a much higher degree of scrutiny” than that needed for search warrant, because wiretap authorization cannot be sought by any peace officer].)<sup>12</sup>

---

<sup>12</sup> The principle stated in *People v. Jackson, supra*, 129 Cal.App.4th at page 171, that the law requires disclosure of all statements made by a defendant, is dictum; the court

The procedures outlined in *Hobbs* require that even upon a showing of possible inaccuracies in the supporting affidavit's evidence, the court's review of the privileged material must take place in camera, out of the presence of the defendant and the defendant's counsel. (7 Cal.4th at pp. 972-973.) "This procedure will assure the defendant of a judicial check on possible police misrepresentations, while preventing both unfounded fishing expeditions and inadvertent revelations of the identity of confidential police informants." (*People v. Luttenberger, supra*, 50 Cal.3d at p. 24; see *Hobbs, supra*, 7 Cal.4th at p. 966; *United States v. Henderson, supra*, 241 F.3d at 645 [in camera hearing is favored procedure to determine whether disclosure is required].)

These procedures have long governed challenges to the sufficiency of a search warrant's supporting affidavits. The procedures that the *Hobbs* decision sets forth apply equally to the determination of a defendant's right to disclosure of confidential information in connection with a challenge to wiretaps. The appellants have failed to demonstrate that the trial court abused its discretion by ruling that the procedures set forth in *Hobbs* adequately protected their rights with respect to their requests for disclosure of privileged documentation, and to their challenges to the sufficiency of the wiretap authorization orders in this case.

**3. The defendants' claim of inaccuracies in the wiretap authorization affidavits did not require either disclosure of the unredacted affidavits or suppression of the wiretap evidence.**

Appellants contend that in the trial court they identified several factual misrepresentations and omissions in the affidavit of Special Agent Salaiz, regarding

---

determined that the error it perceived in that case was harmless and did not affect the decision's outcome. Nor does its analysis apply here, in any event. In *Jackson*, the defendants sought disclosure of their wiretap-intercepted statements in order to prepare their defense to the charges for which they were being prosecuted. Here, the issue was whether disclosure was required in connection with their challenges to the wiretap authorizations, not with respect to guilt or innocence of the charges against them—an issue that *Hobbs* held, with respect to search warrants, did not overcome an otherwise valid privilege claim. (*Hobbs, supra*, 7 Cal.4th at pp. 959-960.)

“both the existence of probable cause . . . and the degree of effectiveness of normal investigative techniques.” They contend that these falsities and omissions were sufficient to require suppression of the wiretap evidence—or at least to require an open evidentiary hearing; and that disclosure of the redacted supporting affidavits was insufficient to satisfy the prosecution’s discovery obligations.

We find no error in the trial court’s refusal either to order additional disclosure of the redacted portions of the supporting documentation, or suppression of the wiretap evidence.

**a. It was appellants’ burden to establish that alleged inaccuracies in the affidavits were material to the magistrates’ issuance of the wiretap authorizations.**

In order to justify an evidentiary hearing to determine the accuracy of the facts in a search warrant’s supporting affidavits—and no less so with respect to affidavits supporting a wiretap authorization order—it is not enough that a defendant casts some doubt on the truthfulness of statements made in a supporting affidavit; that alone does not justify either disclosure of privileged information, or suppression of the fruits of a resulting search or wiretap. A defendant must make a substantial showing not only that the affidavit rests upon false statements of fact, but also that those false statements are material to the defendant’s guilt or innocence, or at least to the grounds (such as the necessity and probable cause to support the search) on which the sufficiency of the affidavits are challenged. (*United States v. Ippolito, supra*, 774 F.2d at p. 1485; see *People v. Luttenberger, supra*, 50 Cal.3d at p. 23, quoting *Franks v. Delaware, supra*, 438 U.S. at p. 155.) “A defendant bears the burden of proving that a wiretap is invalid once it has been authorized” (*U.S. v. Ramirez-Encarnacion* (10th Cir. 2002) 291 F.3d 1219, 1222; *People v. Davis, supra*, 168 Cal.App.4th at p. 630), and the “harmless error” test requires the court to disregard errors and defects that do not affect the parties’ substantial rights. (Code Civ. Proc., § 475; *People v. Jackson, supra*, 129 Cal.App.4th at p. 152.)

The defendant's burden is to demonstrate a substantial possibility that the allegedly false statements of fact were material to the defendant's guilt or innocence, or at least to determination of the affidavit's sufficiency (in this case, to the showing of probable cause and necessity for the wiretap orders, or justification for the claims of privilege). (*People v. Luttenberger, supra*, 50 Cal.3d at p. 23.) "As a general rule, proof that law enforcement officials either lied or made reckless misstatements in affidavits to secure a warrant or order does not in and of itself invalidate that warrant or order, or compel suppression of evidence obtained upon its execution." Only "false statements that are material in causing the warrant to issue will invalidate it." (*United States v. Ippolito, supra*, 774 F.2d at p. 1485.)

The materiality of the alleged inaccuracies depends upon how vital the withheld information is to the affidavit's showing. "The more detailed corroborative facts the affidavit provides, the less material any inaccuracy relating to the informant's reliability or the informant's statements may become. If the information allegedly omitted or misstated is merely cumulative, it is not material. [Citations]." (*People v. Luttenberger, supra*, 50 Cal.3d at pp. 23-24.)

As discussed above, the trial court makes this determination, as it did here, based on its in camera review of the unredacted record after the defendants made the minimal threshold showing to justify the use of that procedure.

**b. Appellants have failed to demonstrate the materiality of the claimed inaccuracies to the wiretaps' authorizations.**

The appellants' opening briefs made no attempt to demonstrate that any claimed inaccuracies in the supporting affidavits were intentionally or recklessly made, or were essential to the magistrates' issuance or the trial court's approval of the wiretap authorization orders. The bare contention that the supporting affidavits contain material falsities and omissions is the entirety of the opening brief's discussion of the subject. The opening briefs fail even to identify any specific alleged factual misrepresentation, or where in the record the claimed misrepresentations were called to the trial court's attention. Without that much, the issue need not be reached. "It is neither practical nor

appropriate for us to comb the record” to find support for the contention. (*In re Marriage of Fink* (1974) 25 Cal.3d 877, 888; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738; Cal. Rules of Court, rule 8.204(a)(1)(C).)

In their reply brief the appellants attempt to fill the gap by identifying four purported inaccuracies in Special Agent Salaiz’s averments of probable cause and necessity for the wiretaps. However, even if it were necessary to review these examples on their merits, none could establish any abuse of the trial court’s discretion in declining to order suppression or further disclosure of the wiretap evidence.

With respect to the affidavit’s showing of necessity, for example, the reply brief cites Montes’s declaration stating that a particular car identified in Agent Salaiz’s affidavits was too large to fit in his garage. That contradicted Agent Salaiz’s averment, in order to show the ineffectiveness of surveillance as an alternative investigative technique to wiretaps, that an attempted surveillance at Montes’s home was unsuccessful because Montes’s garage door had closed after the vehicle had entered the garage.

The reply brief next cites Montes’s declaration contradicting Agent Salaiz’s claim that his pre-arrest relationship with Montes had ended when Salaiz declined to meet Montes in Mexico. Montes denied that he had any conversation or relationship with Salaiz before his arrest.

The reply brief also identifies as false Special Agent Salaiz’s averment that a particular confidential informant had a number of “consensually recorded” phone calls with Montes, citing Montes’s denial that he had any consensual communications “with anyone believed or purported to be an informant cooperating with law enforcement.” On that ground Montes contested Salaiz’s reliance on consensually recorded communications involving informants as justifying the need for wiretaps.

These claimed falsities were contradicted by the wiretaps’ supporting affidavits. The trial court determined from its review of the affidavits in camera, in light of the defendants’ claims, that the affidavits disclosed no substantial inaccuracies or recklessness. Moreover, the claimed factual inaccuracies were not at all critical to the sufficiency of the affidavits’ factual showing of probable cause for the wiretaps, or to its

showing of the wiretaps' necessity—the insufficiency of traditional methods of investigation to achieve law enforcement's legitimate goals. The trial court was well within its discretion in concluding that these errors—if they were errors at all—were so trivial as to be immaterial to the wiretaps' validity.

**4. The record supports the trial court's denial of the defendants' requests for suppression of the wiretap evidence and disclosure of the sealed documentation.**

The affidavits supporting the wiretap authorization requests provided factual grounds for the magistrates' approval of the wiretaps based on probable cause and necessity, and for their sealing of the supporting documentation as privileged. In the affidavit supporting wiretap No. 05-198, for example, Special Agent Salaiz averred facts supporting his belief that Montes was involved in directing specific drug trafficking operations, that the requested wiretap would result in evidence of the drug trafficking offenses, that the information on which his belief was based was credible and reliable, and that much of the supporting documentation was entitled to protection from disclosure under the privileges provided in Evidence Code sections 1040 and 1041.

The affidavit also provided substantial factual support for Agent Salaiz's claim that wiretap interception was necessary because normal investigative techniques had been tried and had failed to achieve the investigation's objectives, or were too dangerous or appeared unlikely to succeed if tried. The alternative modes of investigation identified by Agent Salaiz included undercover operations;<sup>13</sup> telephone toll analysis and subscriber information;<sup>14</sup> non-intercepted recordings;<sup>15</sup> surveillance;<sup>16</sup> interviews, grand jury

---

<sup>13</sup> The unsealed portions of Agent Salaiz's affidavit indicated that certain undercover operations had been undertaken without success; that he was concerned that such operations were dangerous and would be compromised by oft-occurring bribery of Mexican law enforcement agents; that policies of United States law enforcement agencies prohibit certain such operations; and that such operations are unlikely to be successful because of compartmentalization tactics used by drug trafficking operations.

<sup>14</sup> The unsealed portions of Agent Salaiz's affidavit indicated that telephone toll analysis had been valuable in showing that defendant Montes was using the target

subpenas, and grants of immunity,<sup>17</sup> trash searches;<sup>18</sup> financial investigation;<sup>19</sup> and mail cover requests.<sup>20</sup> (Each of the affidavits supporting the other wiretap authorization requests provided similar factual grounds.)

Because much of the affidavits' factual information had been redacted and was sealed by the approving magistrates, and because the trial court had ordered disclosure of only a portion of that documentation to the defendants and their counsel, the sealed portions of the documentation were not available to the defendants in the trial court, and are not available to either the appellants or the People in this court. But the magistrates that issued the challenged wiretap authorization orders had the benefit of the sealed documentation; the trial court examined that same documentation in camera, and

---

telephones to facilitate the identified offenses but was not successful in achieving the investigation's goals, largely due to delays in receiving toll information, and because the tolls could not identify the members of the drug trafficking operation or their roles in it.

<sup>15</sup> Virtually this entire portion of the affidavit was redacted as privileged.

<sup>16</sup> Agent Salaiz's affidavit indicated (without redaction) that surveillance of defendant Montes's residence had been undertaken on a number of occasions, but was of minimal success without contemporaneous telephone interceptions, and was impractical (and threatening to the investigation) because of the home's location on a small residential street where surveillance was likely to be noticed.

<sup>17</sup> Agent Salaiz's affidavit described (with only slight redaction) the investigation's lack of success in obtaining information from interviews, grand jury subpenas, or grants of immunity to other members of the drug trafficking organization, and reasons that future success of these methods would be both unlikely to succeed, and likely to compromise the investigation.

<sup>18</sup> Agent Salaiz's affidavit described (without redaction) the investigation's nonuse of trash searches because of the location of defendant Montes' residence on a quiet cul-de-sac where any trash search would be very noticeable, and because sophisticated drug traffickers typically do not use residential trash containers to dispose of incriminating evidence.

<sup>19</sup> Agent Salaiz's affidavit described (with only slight redaction) the reasons investigation of defendant Montes's available financial records had not yet been undertaken, and would be unlikely to aid this stage of the investigation.

<sup>20</sup> Agent Salaiz's affidavit described (without redaction) why a mail cover would not provide needed information.

explicitly relied on it in ruling on the defendants’ disclosure requests and motions to suppress. And this court, too, has full access to the sealed, unredacted affidavits for its review of the trial court’s rulings, consistent with legal authority. (Evid. Code, § 1042, subd. (d) [“only a court may have access” to contents of sealed unredacted evidence supporting claim of privilege]; Ct. App., Second Dist., Local Rules, rule 1(2).)<sup>21</sup> This court has availed itself of that access, and has reviewed the sealed affidavits supporting the wiretap authorization orders.

Based on our review, we are satisfied that the trial court properly considered and determined the truth or falsity of each of the affidavits’ alleged misstatements. The record provides no indication that the trial court found the challenged allegations to be inaccurate in the ways contended by the appellants, or (even if it had) that it found them to be material to the authorization orders’ issuance; or (even if they were material) that there is any reasonable likelihood that without the allegedly inaccurate facts the trial court would have determined that the affidavits’ showings of probable cause, necessity, and justification for the privilege and nondisclosure were insufficient. (*Hobbs, supra*, 7 Cal.4th at p. 974; *Franks v. Delaware, supra*, 438 U.S. at pp. 155-156.) We therefore find no error or abuse of discretion in the trial court’s rulings.

The trial court determined from its examination of the unredacted supporting affidavits that the issuing magistrates did not abuse their discretion in finding probable cause and necessity for the wiretaps. And it determined that only a portion of the sealed documentation could be disclosed without jeopardizing law enforcement’s legitimate need for confidentiality and claims of privilege, when balanced with the defendants’ needs for disclosure of information that is “relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause . . . .” (*Roviaro v. United States, supra*, 353 U.S. at pp. 60-61.) This court’s review of the record—both the redacted and

---

<sup>21</sup> Second District Court of Appeal, Local Rules, rule 1(2) provides in pertinent part: “Unless otherwise ordered by this court, the sealed transcripts of a hearing from which the appellant and defense counsel were excluded may be examined only by a justice of this court personally.”

the sealed unredacted record—confirms the trial court’s ample justification for these determinations. (See *People v. Jackson, supra*, 129 Cal.App.4th at p. 146 [“In reviewing a trial court’s ruling on a motion to suppress evidence we defer to the court’s express or implied factual findings if they are supported by substantial evidence”]; *People v. Ayala* (2000) 23 Cal.4th 225, 255.)

The appellants have failed to show that nondisclosure of the redacted documentation could have deprived them of a fair hearing or of the fundamental fairness to which they were entitled. (Evid. Code, § 1042, subd. (d).) Without that showing, they have failed to make the demonstration that would be required to overcome the prosecution’s privilege claims, and they have failed to show either error or prejudice in the trial court’s refusal to order disclosure of the redacted documentation, or in its order denying suppression of the resulting evidence.

**DISPOSITION**

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.